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ABSTRACT

This document outlines the constitutional protections available to public school teachers as a result of recent court decisions based on the First Amendment and the due process and equal protection clauses of the Fourteenth Amendment. The first and largest section cites legal cases relating to First Amendment guarantees as applied to 1) out-of-class speech, 2) classroom speech, 3) personal appearance, 4) private life, 5) political activity, 6) civil rights activity, 7) organizational membership, 8) loyalty and other oaths. The second section describes legal cases relating to Fourteenth Amendment guarantees which protect teachers from dismissal for arbitrary or discriminatory reasons, and the third section reports legal cases relating to Fourteenth Amendment guarantees which protect teachers from dismissal without notice of the charges, a fair hearing, and related procedural safeguards. (RT)

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# *Protecting Teacher Rights*

*a summary of constitutional developments*

*by*
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*General Counsel, National Education Association*

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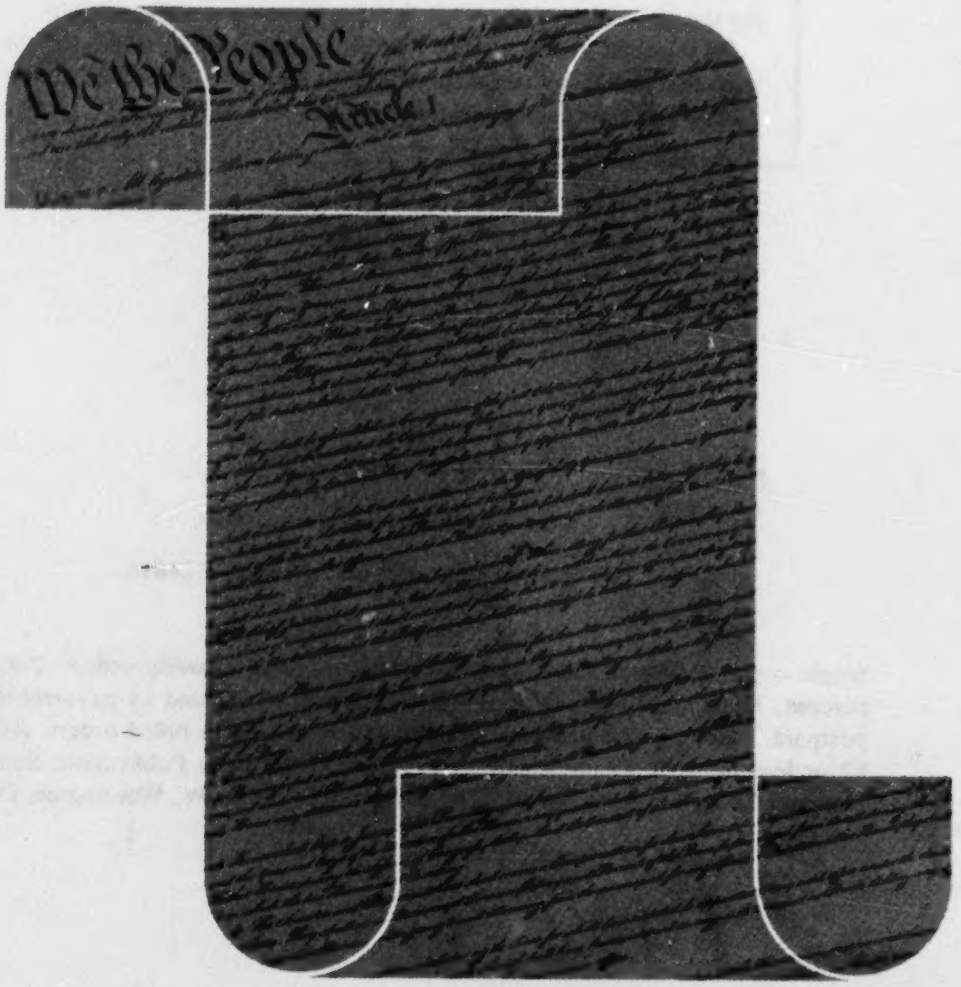

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# *I. INTRODUCTION*

In *Keyishian v. Board of Regents*,[1] the United States Supreme Court repudiated in its entirety the ancient distinction in constitutional status between public and private employees whereby "public employment, including academic employment, may be conditioned upon the surrender of constitutional rights which could not be abridged by direct government action."[2] Adopting the language of the court below, the Supreme Court stated: "[T]he theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected."[3] Public employees cannot be "relegated to a watered-down version of constitutional rights"[4] solely because they are public employees.

It is the purpose of the present document to consider the significance of the foregoing legal principle for public school teachers.[5] Before doing so, however, one preliminary statement is appropriate. Since this document deals with protections derived from the Constitution, the comments made know no state lines and apply to *all* teachers, regardless of tenure or contractual status.

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[1] 385 U. S. 589 (1967).

[2] *Id.* at 605.

[3] *Id.* at 605-606, quoting from 345 F. 2d 236, 239 (1965).

[4] *Garrity v. New Jersey*, 385 U. S. 493, 500 (1967).

[5] Unless otherwise indicated, the term "teacher" is used herein to refer to any professional employee of a public school system.

## *II. THE CONSTITUTIONAL FRAMEWORK*

The main sources of constitutional protection for teachers and the primary focus of this document are the First Amendment guarantees of freedom of expression and association and the due process and equal protection clauses of the Fourteenth Amendment.[6] The full text of the First Amendment and the relevant portion of the Fourteenth Amendment are set forth below:

> Amendment I:
> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.[7]
>
> Amendment XIV:
> Section 1. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The nature of the protection afforded by these and other constitutional provisions is reflected in the following three propositions, each of which will be considered in detail:

A. No teacher may be dismissed, reduced in rank or compensation, or otherwise deprived of any professional advantage because of the exercise of constitutionally protected rights.

B. No teacher may be dismissed, reduced in rank or compensation, or otherwise deprived of any professional advantage for arbitrary or discriminatory reasons.

C. No teacher may be dismissed, reduced in rank or compensation, or otherwise deprived of any professional advantage unless he is given notice of the charges against him, a fair hearing, and related procedural safeguards.

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[6] Other amendments are also involved, although to a somewhat lesser degree. See, for example, the discussion at footnotes 30 to 35, *infra*, dealing with the Fifth Amendment right against self-incrimination.

[7] Although by its terms the First Amendment prohibitions apply only to action by Congress, the courts have interpreted these prohibitions to apply to action by any agency of the federal government and, through the Fourteenth Amendment, to action by any state or political subdivision thereof. See, e.g., *Zorach v. Clauson*, 343 U. S. 306 (1952); *Murdock v. Commonwealth of Pennsylvania*, 319 U. S. 105 (1943); *Busey v. District of Columbia*, 138 F. 2d 592 (1943); *McIntire v. Wm. Penn Broadcasting Co. of Philadelphia*, 151 F. 2d 597 (1945).

It should be noted that although these propositions refer broadly to a dismissal, reduction in rank or compensation, or other deprivation of any professional advantage, not infrequently the only cases cited in support involve a dismissal. The precise nature of the employer's action, however, is of secondary importance, and the underlying legal principle would apply with equal force to a failure to reappoint, a suspension, a demotion, or the like. The courts have held that an individual shall suffer no "penalty" in derogation of constitutional rights and a "penalty" has been defined as "the imposition of any sanction which . . . [is] 'costly.' " [8]

## *A. No teacher may be dismissed, reduced in rank or compensation, or otherwise deprived of any professional advantage because of the exercise of constitutionally protected rights.*

This proposition has been termed "the doctrine of unconstitutional conditions," since it prohibits the conditioning of "the enjoyment of a government-connected interest . . . upon a rule requiring that one abstain from the exercise of some right protected by an express clause in the Constitution." [9] The underlying rationale was explained as follows by the United States Supreme Court almost a half century ago:

> It would be a palpable incongruity to strike down an act of state legislation which, by words of express divestment, seeks to strip the citizen of rights guaranteed by the federal Constitution, but to uphold an act by which the same result is accomplished under the guise of a surrender of a right in exchange for a valuable privilege which the state threatens otherwise to withhold. . . . If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like

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[8] *Spevack v. Klein*, 385 U. S. 511 (1967). Compare *Griffin v. State of California*, 380 U. S. 609, 614 (1964); *Malloy v. Hogan*, 378 U. S. 1, 8 (1964).

In *Roth v. The Board of Regents of State Colleges*, No. 69-C-24, Slip Op. at 6 (U.S.D.C., W.D. Wisc. March 16, 1970), the court indicated that it is not "material whether employment is terminated during a given contract period, or not renewed for a subsequent period." See also *Pred v. Board of Public Instruction*, 415 F. 2d 851 (5th Cir. 1969); *McLaughlin v. Tilendis*, 398 F. 2d 287 (7th Cir. 1968); *Johnson v. Branch*, 364 F. 2d 177 (4th Cir. 1966), cert. denied, 385 U. S. 103 (1967); *Gouge v. Joint School District No. 1*, No. 69-C-166, Slip Op. (U.S.D.C., W.D. Wisc. March 16, 1970).

Nor does the fact that the teacher resigned necessarily cure the constitutional infirmity. As the court noted in *Montgomery v. White*, Civ. Action No. 4933, Slip Op. at 4 (U.S.D.C., E.D. Tex. Oct. 24, 1969), "Whether plaintiff . . . resigned in the face of [an unconstitutional] policy or was refused a contract for the following year can be a distinction of little consequence."

[9] Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439, 1445-46 (1968). See also note, *Unconstitutional Conditions*, 73 HARV. L. REV. 1595, 1596 (1960).

> manner, compel a surrender of all. It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence.[10]

One federal district court recently summarized the situation in the following terms:

> With respect to substantive protection of a [teacher's] "First Amendment" rights, the rule is crystal clear. The employment of a teacher in a public school cannot be terminated because he has exercised that freedom secured to him by the Constitution of the United States. . . . [T]his substantive constitutional protection is unaffected by the presence or absence of tenure under state law.[11]

For purposes of discussion, the matters that have been the subject of judicial consideration have been divided into the following categories:

1. Out-of-Class Speech
2. Classroom Speech (i.e., Academic Freedom)
3. Personal Appearance
4. Private Life
5. Political Activity
6. Civil Rights Activity
7. Organizational Membership
8. Loyalty and Other Oaths.

This breakdown is somewhat artificial, and there is obviously an overlap among the categories. For example, the line between political and civil rights activity is not always a clear one, and organizational membership may itself often be a form of political activity. Notwithstanding these and other similar points of overlap, however, we believe that a division of the foregoing type contributes to the clarity of the presentation.

### *1. Out-of-Class Speech*

The most definitive ruling on the right of a teacher to speak freely outside the classroom is *Pickering v. Board of Education.*[12] The facts were as follows: Pickering was a teacher in Illinois who had sent to a local newspaper for publication a letter charging that (a) the school

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[10] *Frost Trucking Co. v. Railroad Comm'n of Calif.*, 271 U. S. 583, 593-94 (1926).

Although not literally appropriate within a discussion of constitutional rights, it is worth noting that the courts also have made it clear that a teacher may not be penalized because of the assertion of federal rights guaranteed other than by the Constitution. For example, a probationary teacher who was refused reappointment because she was absent from the classroom while serving on a federal jury was ordered reinstated with back pay on the ground that she could not be penalized for the exercise of her legal right "to take part in the administration of justice." *Bomar v. Keyes*, 162 F. 2d 136, 139 (2d Cir. 1947).

[11] *Roth v. The Board of Regents of State Colleges, supra*, at 5-6.

[12] 391 U. S. 563 (1968).

board had misinformed the public about its allocation of financial resources in a proposed school bond issue; and (b) the superintendent had threatened to discipline any teacher who refused to support the bond issue. After a full hearing, the school board decided that the letter was "detrimental to the efficient operation and administration of the schools of the district" [13] and terminated Pickering's employment. Contending that his dismissal violated the First and Fourteenth Amendments, Pickering brought suit in an Illinois court. The state courts rejected his claim, but the United States Supreme Court disagreed and ordered his reinstatement. In concluding that the letter was a lawful exercise of Pickering's right of free speech, the Court stated:

> To the extent that the Illinois Supreme Court's opinion may be read to suggest that teachers may constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public schools in which they work, it proceeds on a premise that has been unequivocally rejected in numerous prior decisions of this Court.[14]

The Supreme Court made it clear that where the statements at issue are true or substantially so, a school board can circumscribe a teacher's right to publicize his views only if it is able to show a compelling need for confidentiality, or to demonstrate that the employee's working relationship with his superiors is of such a personal and intimate nature that public criticism would destroy it.[15]

A significant aspect of the *Pickering* decision derives from the fact that the school board concluded that the letter contained several false statements which "unjustifiably impugned the 'motives, honesty, integrity, truthfulness, responsibility and competence' " [16] of the school administrators and board members and damaged their professional reputations. Accepting this as so, the Supreme Court held that the board still might impose discipline only under limited circumstances. The mere fact that the statements may have damaged the personal reputations of the teacher's superiors or have fomented controversy and conflict among school personnel and the public was not sufficient.[17] The court stated that a teacher is entitled to the same freedom to comment on issues of public concern as any other member of the public.

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[13] *Id.* at 564.

[14] *Id.* at 568.

[15] *Id.* at 570.

[16] *Id.* at 567.

[17] *Id.* at 570.

More specifically, "in a case such as this, absent proof of false statements knowingly or recklessly made by him, a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment." [18] The court thus applied the libel standard first announced in *New York Times Company v. Sullivan* [19] based upon the "public interest in having free and unhindered debate on matters of public importance." [20]

The Supreme Court's statement of the problem in *Pickering* is particularly pertinent:

> The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.[21]

Furthermore, even where a teacher's statements are so clearly without foundation as to raise questions regarding his fitness to perform his classroom duties, the statements can be used only as "evidence of the teacher's general competence, or lack thereof"; they cannot serve as an independent basis for discipline.[22]

Consistent with the holding in *Pickering*, the California Supreme Court enjoined the enforcement of a school board regulation prohibiting teachers from circulating a petition on school premises during duty-free lunch periods.[23] The petition, which was addressed to the governor of California, members of the Los Angeles Board of Education, and administrators of the Los Angeles school system, opposed certain reductions in the state legislature's proposed budget. The fact that the circulation of a controversial document critical of the legislature might

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[18] *Id.* at 574.

[19] 376 U. S. 254 (1964).

[20] 391 U. S. at 573. Since the court concluded that Pickering's statements were not knowingly or recklessly false, it left open the question of whether statements that are knowingly or recklessly false are still protected by the First Amendment in the absence of a showing or a reasonable presumption that they are actually harmful to a legitimate state interest (e.g., the efficiency of public education).

[21] *Id.* at 568. See Morris, *Public Policy and the Law Relating to Collective Bargaining in the Public Service*, 22 Sw. L. J. 585 (1968).

[22] 391 U. S. at 573, n. 5.

There has been some indication from the courts, however, that where there is an established grievance procedure which is an appropriate channel for the airing of employee grievances, the employee will be held accountable for his failure to utilize such a procedure prior to making his grievances public. *Pickering v. Board of Education, supra*, at 572, n. 4. Conversely, where the grievance procedure is clearly inadequate or not designed for the purpose of reviewing the particular type of grievance involved, there is no requirement that the employee pursue that route first. *Tepedino v. Dumpson*, 24 N.Y. 2d 705, 249 N.E. 2d 751 (1969).

[23] *Los Angeles Teachers Union v. Los Angeles City Board of Educ.*, 78 Cal. Rptr. 723, 455 P. 2d 827 (1969).

foment some discord and disturbance within the school system was not sufficient to justify the school's attempt to restrict the teachers' use of their duty-free time. This was true even though the school had authorized the teachers to hold meetings after school hours on school property for the circulation of the petition. The court noted that "[t]olerance of the unrest intrinsic to the expression of controversial ideas is constitutionally required even in the schools." [24] It therefore concluded that the circulation of the petition, which was designed to make school administrators and legislators more responsive to the needs of their constituents, could not constitutionally be restricted except to ward off a real and imminent danger which involved far more than "public inconvenience, annoyance, or unrest." [25]

Nor must a teacher's public criticism of his school system be couched in mild or innocuous terms to be entitled to constitutional protection. Illustrative is *Puentes v. Board of Educ. of Union Free School Dist. of Bethpage*, in which a high school teacher in New York had been suspended without pay for distributing to his fellow teachers copies of a letter he had written to his employing board of education which was highly critical of the board's failure to renew a probationary teacher's contract.[26]

Although the New York court found that the teacher's strident accusations could easily be characterized as excessive, the inaccuracies contained in the letter were not, in the words of *Pickering*, the result of reckless or intentional falsehood. Moreover, the school board had not produced evidence of any actual or threatened damage to the school system. Accordingly, the court directed reinstatement and warned that a school board was not justified in taking disciplinary action against "indiscreet bombast in an argumentative letter" without evidence of actual damage to the efficient operation of the school system, or, alternatively, proof that the employee had recklessly and intentionally published false accusations.[27] The court reasoned that to allow school boards to discipline teachers for their harsh or even false criticism in an area where criticism is otherwise permissible would either discourage them from exercising their right of free speech or would require

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[24] 455 P. 2d at 832.

[25] *Id.* at 831. See also *Donovan v. Mobley*, 291 F. Supp. 930 (C.D. Calif. 1968), where a city lifeguard had been discharged for writing several newspaper articles exposing controversial activities at the city beach. He was ordered reinstated upon the court's finding that the articles did not have so damaging an impact upon the efficiency of the lifeguard service as to warrant the city's infringement upon his right to express his views publicly.

[26] 24 N.Y. 2d 996, 250 N.E. 2d 232 (1969), on remand from the U. S. Supreme Court, 392 U. S. 653 (1968).

[27] 24 N.Y. 2d at 998.

them to couch it "in such innocuous terms as would make the criticism seem ineffective or obsequious." [28]

Similarly, a professor's inaccurate criticism of the conduct of the president of the public college at which he was employed, coupled with the distribution of a magazine article that was critical of the college administration's operating procedures, was held to constitute protected activity, even though the court stated that there may have been some impropriety in the nature of the professor's remarks.[29]

In addition to protecting a teacher's right to speak, the courts also have recognized his corollary right to remain silent. More specifically, all public employees are entitled to exercise fully their Fifth Amendment right against self-incrimination, and a public employer cannot use the threat of discharge or discipline to secure incriminatory evidence.[30] Thus, the convictions of police officers based on answers to questions by the state attorney general as to alleged fixing of traffic tickets were reversed by the United States Supreme Court on the ground that the state statute requiring the officers to answer or to forfeit their positions was unconstitutional. As the court phrased it, "policemen, like teachers and lawyers, are not relegated to a watered-down version of constitutional rights." [31]

The Supreme Court also has held that a state university professor could not, under threat of penalty, be compelled to answer questions regarding the content of his classroom lectures or his knowledge of allegedly subversive organizations.[32] To deny a teacher the same protection afforded other persons to stand on the Fifth Amendment would, in the court's view, constitute an unconstitutional denial of equal protection.[33]

It should be noted, however, that while teachers have a constitutional right to remain silent, it does not necessarily follow that they may refuse to appear before an investigating agency. In a New York case,

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[28] *Id.* at 999.

[29] *Nevada v. Board of Regents of Univ. of Nevada*, 269 P. 2d 265 (1954). See also *Tepedino v. Dumpson, supra*, where the New York Court of Appeals reinstated social investigators who were suspended for writing letters that were critical of their employing department's operating procedures.

[30] *Garrity v. New Jersey*, 385 U. S. 493, 497 (1967); *Sweezy v. New Hampshire*, 354 U. S. 234 (1957); *Slochower v. Board of Higher Educ. of N.Y.C.*, 350 U. S. 551 (1956).

[31] *Garrity v. New Jersey, supra*, at 500.

[32] *Sweezy v. New Hampshire, supra.* See also *Slochower v. Board of Higher Education of N.Y.C., supra.*

[33] The court indicated, in addition, that the attempt to compel the professor to answer questions regarding his classroom lectures was an infringement upon his academic freedom. It emphasized that "[t]eachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die." *Sweezy, supra*, at 250.

several faculty members of the State University filed suit when they were disciplined for refusing to comply with a subpoena demanding their appearance before a grand jury to answer questions as to whether they had ever used drugs with students or had advocated such use to students or to the college administration.[34] Although the district attorney acknowledged that these faculty members were the target of an investigation of campus drug abuses, the court held that the issuance of the subpoena was not, in and of itself, a violation of their Fifth Amendment rights. The court did indicate, however, that had the plaintiffs elected to appear before the grand jury and at that point refused to answer questions, this refusal could not be construed as the equivalent of guilt or be otherwise used against them in any fashion by their employer.[35]

*2. Classroom Speech (i.e., Academic Freedom)*

The courts have been jealous guardians of First Amendment rights when academic freedom is involved. As the United States Supreme Court put it:

> When academic teaching-freedom and its corollary learning-freedom, so essential to the well-being of the Nation, are claimed, this Court will always be on the alert against intrusion . . . into this constitutionally protected domain.[36]

The Supreme Court reiterated this point in the *Keyishian* case:

> Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom.[37]

Although in the past much of the concern with academic freedom has focused upon the colleges and universities,[38] the considerations which militate in favor of academic freedom—our historical commitment to free speech for all, the peculiar importance of academic inquiry to the progress of society, the need that both teacher and student

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[34] *Boikess v. Aspland*, 24 N.Y. 2d 136, 247 N.E. 2d 135 (1969).

[35] *id.* at 142. See also *Slochower v. Board of Higher Education of N.Y.C., supra*, at 557. In the *Boikess* case, the court also cautioned that any governmental action designed to curtail the plaintiffs' right to advocate the use of drugs would be unconstitutional. 24 N.Y. 2d at 142.

[36] *Barenblatt v. United States*, 360 U. S. 109, 112 (1959).

[37] 385 U. S. 589, 603 (1967). See also *Shelton v. Tucker*, 364 U. S. 479, 487 (1960) ("The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.").

[38] In *Sweezy v. New Hampshire, supra*, at 250, for example, the court spoke of the "essentiality of freedom in the community of American universities."

operate in an atmosphere of open inquiry, feeling always free to challenge established concepts—are relevant to elementary and secondary schools as well as to institutions of higher learning.

The balancing test laid down in the *Pickering* case (i.e., the employer's interest in the efficient dispatch of his business *vs.* the employee's interest in saying what he thinks) applies also to classroom speech, but the difference in context may affect the results of the balance. This point is illustrated by the case of *Goldwasser v. Brown.*[39]

Goldwasser was a civilian employee of the Air Force who served as an instructor at an Air Force language school. His job was to teach basic English to foreign military officers in this country as guests of the U.S. government. The charge against him was that, in the face of prior warnings that discussion of controversial subjects (e.g., religion, politics, race) during the class hours was contrary to Air Force policy, he made such forbidden statements to his classes on two separate occasions. One was to the effect that those who burn themselves to death as a protest against the Vietnam war are the true heroes, and that he wished he had the courage to do it himself. The other was that Jews are discriminated against in the United States and that he had experienced such discrimination throughout his life, including during his service at the language school.

The chief of the language school regarded this conduct on Goldwasser's part as prejudicial to the interests of the U.S. government and discharged him.

In contending that a discharge for the above reason infringed upon his First Amendment rights, Goldwasser relied heavily upon the *Pickering* case. He argued that "the view taken there by the Supreme Court of the right of a teacher to speak his mind without forfeiting his job has full and complete application here."[40] While the court recognized the significance of the principle stated in *Pickering,* it concluded that the challenged dismissal was lawful under the test prescribed by the Supreme Court. In reaching this conclusion, the court noted particularly that "Pickering was not fired for what he said in class . . ."[41] and then went on to comment as follows:

> On the record before us, we must assume that appellant [i.e., Goldwasser] was fired for what he said *within* the classroom to foreign officers who were supposed to be learning how to cope with an English-speaking dentist or garage repairman, and not for airing his views outside the classroom to anyone who would listen. There is nothing to suggest that appellant was required to keep his opinions to himself at all times

[39] 417 F. 2d 1169 (D.C. Cir. 1969), cert. denied, 38 U. S. L. Week 3314 (Feb. 24, 1970).

[40] *Id.* at 1176.

[41] *Id.* at 1177.

> or under all circumstances, but only in the immediate context of his highly specialized teaching assignment—and we stress the uniqueness of appellant's teaching function in our disposition of this point. In view of that uniqueness, we cannot say that any of the interests underlying the First Amendment were served by appellant's insistence upon intruding his personal views into the classroom, or that his employer was disabled by those interests from imposing and enforcing the very limited restriction emerging from this record.[42] (emphasis by the court)

Although it is not possible to define the precise metes and bounds of academic freedom, certain general guidelines may be obtained from a consideration of particular cases. Thus, a teacher may not constitutionally be prohibited from informing his class about the precepts of Marxism or other political philosophies of educational value that may be in opposition to governmental policies.[43] Nor may government require a teacher to tailor his classroom presentation to conform to the principles or prohibitions of any religious sect or dogma. The United States Supreme Court was explicit on this point when it struck down a state statute which prohibited the teaching of evolution (i.e., the Arkansas "monkey law"):

> The State's undoubted right to prescribe the curriculum for the public schools does not carry with it the right to prohibit, on pain of criminal penalty, the teaching of a scientific theory or doctrine where that prohibition is based upon reasons that violate the First Amendment. It is much too late to argue that the State may impose upon the teachers in its schools any conditions that it chooses, however restrictive they may be of constitutional guarantees.[44]

Similarly, state regulations prohibiting the teaching of certain subjects, such as foreign languages, have been held to infringe upon the constitutionally protected liberties of teachers and students, including the right to teach.[45]

One of the most recent cases in the area of academic freedom involves a high school teacher in Massachusetts who assigned to his senior English class an article from the September 1969 *Atlantic Monthly* magazine.[46] Appearing with some frequency in the article

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[42] *Ibid.*

[43] See Emerson, Thomas I.; Haber, David; and Dorsen, Norman. *Political and Civil Rights in the United States*. Boston: Little, Brown, & Co., 1967. Vol I, pp. 902-1067; *Keyishian v. Board of Regents*, 385 U. S. 589, 600 (1967); *Georgia Conf. of AAUP v. Board of Regents of Univ. System of Ga.*, 246 F. Supp. 553 (N.D. Ga. 1965).

[44] *Epperson* v. *Arkansas*, 393 U. S. 97, 107 (1968).

[45] *Meyer v. Nebraska*, 262 U. S. 390 (1923); *Bartels v. Iowa*, 262 U. S. 404 (1923).

[46] *Keefe v. Geanakos*, 418 F. 2d 359 (1st Cir. 1969).

was a term characterized by the court as "a vulgar term for an incestuous son," which was "admittedly highly offensive."[47] Any student who found the article personally objectionable was given the option of taking another assignment. Subsequently, the teacher was summoned to a meeting with the school board and was requested to state that he would never again use the term in the classroom. When he refused to do so, he was suspended.

The U.S. Court of Appeals directed the trial court to enjoin the school board from disciplining the teacher. As the appellate court saw it, the basic question presented by this case was "whether a teacher may, for demonstrated educational purposes, quote a 'dirty' word currently used in order to give special offense, or whether the shock is too great for high school seniors to stand."[48] While recognizing that the same standards applicable to obscenity laws for adult consumption might not be applicable in determining what is proper for classroom presentation, the court nonetheless concluded that the prohibition against distribution of a nonpornographic scholarly article which happens to contain offensive language cannot be tolerated in an atmosphere of academic freedom. The court summarized its ruling in these terms:

> If the answer were that the students must be protected from such exposure, we would fear for their future. We do not question the good faith of the defendants in believing that some parents have been offended. With the greatest of respect to such parents, their sensibilities are not the full measure of what is proper education.[49]

Even if it is assumed that some regulation of classroom presentation is proper, at least in the elementary and secondary schools, it now seems clear that the judgment as to what is permissible cannot be made on the basis of parental or community opinion or of factors that do not relate directly to sound educational precepts. Rigorous censorship categorically defining the limits of classroom discussion cannot be tolerated, and courts will strike down any unwarranted restriction upon the professional freedom of teachers. As the Supreme Court has stated, such confinements have the "unmistakable tendency to chill that free play of the spirit which all teachers ought especially to cultivate and practice." [50]

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[47] *Id.* at 361.

[48] *Ibid.*

[49] *Id.* at 361-62.

[50] *Wieman v. Updegraff*, 344 U. S. 183, 195 (1952).

See also *Pred v. Board of Public Instruction of Dade Co.*, 415 F. 2d 851 (5th Cir. 1969), in which it was alleged that one of the bases for the board's failure to reemploy the plaintiff was the fact that she had supported in her classroom lectures student demands for greater campus freedoms. In reversing the lower court's dismissal of the complaint, the appellate court indicated that it would

The Supreme Court further fortified this general proposition in *Tinker v. Des Moines Independent Community School District*, involving students' rights.[51] In that case, several students wore black armbands while in school as a method of protesting the war in Vietnam and of expressing their support for a truce. They were thereupon suspended until they were willing to return without the armbands. The court held that the wearing of armbands is closely akin to "pure speech" under the First Amendment. As such, it cannot be prohibited because of undifferentiated fear or apprehension of disturbance. Such a prohibition is permissible only where it can be demonstrated that the activity "materially and substantially interfere[s] with the requirements of appropriate discipline in the operation of the school." [52]

Since a teacher, by virtue of his position, has unique impact upon the students, caution must be used in drawing analogies to comparable teacher activity. However, the breadth of language of certain passages in the court's opinion is worth noting vis-à-vis a teacher's classroom conduct. Thus, the court commented that:

> First Amendment rights, applied in the light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.[53]

Equally significant is the court's acknowledgment that, in order to preserve the integrity of the educational system, free and open classroom discussion of controversial topics is essential:

> The classroom is peculiarly the "marketplace of ideas." The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth "out of a multitude of tongues, [rather] than through any kind of authoritative selection." [54]

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be necessary for the school board to demonstrate that the conduct had disrupted classroom activity or had substantially threatened the school's operation.

The reasoning by which a court in 1965 sustained the failure to renew the contract of a nontenure teacher who assigned Aldous Huxley's *Brave New World* to his class in violation of school regulations *(Parker v. Board of Educ. of Prince George's Co.*, 237 F. Supp. 222 (D. Md. 1965) aff'd, 348 F. 2d 464 (4th Cir. 1965), cert. denied, 382 U. S. 1030 (1966)) seems clearly out of phase with current judicial thinking in this area.

[51] 393 U. S. 503 (1969).

[52] *Id.* at 509. See also *Burnside v. Byars*, 363 F. 2d 744 (5th Cir. 1966) (students' suspension from school for wearing "freedom buttons" reversed); compare *Blackwell v. Issaquena Co. Board of Educ.*, 363 F. 2d 749 (5th Cir. 1966) (wearing of freedom buttons accompanied by harassment and interruption of classes was found sufficiently disruptive to warrant suspension).

[53] 393 U. S. at 506.

[54] *Id.* at 512. See also *Keyishian v. Board of Regents, supra*, at 603; *Shelton v. Tucker, supra*, at 487.

In *Zucker v. Panitz*, 299 F. Supp. 102, 105 (S.D.N.Y. 1969), a school board's refusal to allow

### 3. *Personal Appearance*

The courts have scrutinized with great care school board regulations that seek to establish standards regarding a teacher's appearance. They have viewed such appearance as a form of constitutionally protected expression, an aspect of "liberty" protected by the due process clause of the Fourteenth Amendment and/or an aspect of privacy which is entitled to constitutional protection.

In *Lucia v. Duggan* a Massachusetts school board dismissed a nontenure teacher for violation of the school's unwritten policy that teachers should be clean-shaven.[55] The court found that the teacher's dismissal violated constitutional standards and ordered his reinstatement with back pay, plus $1,000 compensatory damages for pain and suffering. The court indicated that, at a minimum, a lawful dismissal in this case would have required the existence of a published school policy outlawing beards, adequate notice to the teacher of his violation of such a policy and the consequences that would flow therefrom, and the holding of a fair hearing to establish whether the teacher's unshaven appearance had materially disrupted his classroom or interfered with his performance as a teacher.

Although the court did not hold that a teacher's right to wear a beard is constitutionally protected, it did find that "it is at least an interest of his, especially in combination with his professional reputation as a school teacher, which may not be taken from him without due process of law." [56]

In *Finot v. Pasadena City Board of Education* a California court ruled that a school board cannot remove a teacher from regular classroom duties solely because he insists upon wearing a beard.[57] The court considered the wearing of the beard as a form of "symbolic speech" and held that the board's action improperly abridged the teacher's constitutional rights. There was no evidence (other than the speculation of the high school principal and the superintendent) that the wearing of the beard would have an adverse effect upon the educational process or the behavior of students, nor was there any claim that the beard was untidy or unkempt.

Similarly, the Acting Commissioner of the New York State Education Department ordered the reinstatement of a nontenure teacher who

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students to publish a paid advertisement opposing the war in Vietnam was overturned by a federal court stating that "the principle of free speech is not confined to classroom discussion." But see *Schwartz v. Schucker*, 298 F. Supp. 238 (E.D.N.Y. 1969).

[55] 303 F. Supp. 112 (D. Mass. 1969).

[56] *Id.* at 118.

[57] 250 C.A. 2d 189, 58 Cal. 520 (1967).

had been suspended when he refused to trim his hair and moustache to conform to certain specifications.[58] He held that in the absence of proof that the teacher's appearance "was in any way bizarre or disruptive, or that it interferred with or diminished his effectiveness," the school board did not have the authority to impose what it considered to be "the standards of appearance of the community" as a condition of employment.

In *Braxton v. Board of Public Instruction of Duval County, Florida,* the court held that a school board could not constitutionally refuse to reappoint a Negro teacher for persistent refusal to shave off his goatee.[59] This case involved a dimension that did not exist in the previously cited cases. Not only did the court find that the insistence upon removal of the goatee was "arbitrary, unreasonable and based on personal preference," but it also characterized the goatee as a symbol of racial pride and concluded that the decision not to reappoint was infected with "institutional racism" and intolerance of ethnic diversity.[60]

Further support for the proposition that school boards may not constitutionally impose rigid standards of appearance upon teachers again is found by analogy to cases involving students. In *Breen v. Kahl* the question was the constitutionality of a school board regulation limiting the length of a male student's hair.[61] While the court was not willing to go so far as to find hairstyling within the protection of the First Amendment, it did find that wearing one's hair a certain length is one of the liberties protected by the Fourteenth Amendment against state impairment "in the absence of a compelling subordinating interest."[62] In rejecting the defendant's contention that public schools should be immune from constitutional scrutiny with respect to their regulation of the length of students' hair, the court pointedly stated:

> [This proposition] is to suggest a parallel between the public schools, on the one hand, and the armed forces or a penal institution, on the other.[63]

To the same effect is *Griffin v. Tatum,* in which a high school student had been suspended for violating a rule requiring that boys' hairlines

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[58] *In the Matter of John Collins,* N.Y. Commissioner of Education, No. 8051, Aug. 26, 1969, Government Employee Rel. Rep. No. 313, B-11, Sept. 8, 1969.

[59] 303 F. Supp. 958 (M.D. Fla. 1969).

[60] *Id.* at 959-60. For a discussion of changing social attitudes regarding the wearing of beards, see *In the Matter of the Arbitration between Local 100, Transport Workers Union of America and Manhattan and Bronx Surface Transit Operating Authority* (Nov. 11, 1969, T. Kheel).

[61] 296 F. Supp. 702 (W.D. Wisc. 1969).

[62] *Id.* at 706.

[63] *Id.* at 707-708.

be tapered rather than blocked.[64] In ordering his readmission, the court noted that "there can be little doubt that the Constitution protects the freedoms to determine one's own hair style and otherwise to govern one's personal appearance. Indeed, the exercise of these freedoms is highly important in preserving the vitality of our traditional concepts of personality and individuality." [65]

In neither the *Breen* nor the *Griffin* case was the court impressed with the argument of the school board that the regulations in question would avoid certain administrative problems. While conceding the legitimacy of the objective sought, the courts concluded that the school boards had chosen too blunt an instrument to achieve it.[66] As the court put it in the *Griffin* case, when constitutional freedoms are involved, "the government may not intrude without carrying a substantial burden of justification" [67] and "some undefined fear or apprehension of disturbance . . . is not enough to overcome the constitutional right of this plaintiff and others similarly situated." [68] The court made this point as follows in the *Breen* case:

> An effort to use the power of the state to impair this freedom must also bear "a substantial burden of justification," whether the attempted justification be in terms of health, physical danger to others, obscenity, or "distraction" of others from their various pursuits. For the state to impair this freedom, in the absence of a compelling subordinating interest in doing so, would offend a widely shared concept of human dignity, would assault personality and individuality, would undermine identity, and would invade human "being." It would violate a basic value "implicit in the concept of ordered liberty." [69]

The guiding principle was succinctly summarized by the Supreme Court when it noted, in a somewhat different context, that First Amendment freedoms need "breathing space to survive [and] government may regulate in the area only with narrow specificity." [70]

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[64] 300 F. Supp. 60 (M.D. Ala. N.D. 1969).

[65] *Id.* at 62.

[66] By way of illustration, the court noted in *Griffin* that "[i]f there is any hygienic or other sanitary problem in connection with those students who elect to wear their hair longer than that presently permitted by the regulation there are ways to remedy this other than by requiring their hair shorn." *Id.* at 63.

[67] *Id.* at 62.

[68] *Id.* at 64.

[69] 296 F. Supp. at 706.

[70] *NAACP v. Button*, 371 U. S. 415, 433 (1963). See also *Richards v. Thurston*, 304 F. Supp. 449 (D. Mass. 1969).

*4. Private Life*

The courts have become increasingly reluctant to cast teachers in the role of "Caesar's wife," and the imposition of a penalty by a school board generally will not be sustained unless it is substantiated by factors that (a) reasonably relate to the teacher's professional qualifications and (b) have a demonstrable impact upon the effective operation of the school system.

Thus, an attempt to terminate the contract of a teacher on the ground that his use of vulgar and offensive language in a letter to a former student constituted "immorality" was summarily rebuffed by an Ohio court.[71] The court indicated that the proper criterion for determining whether a teacher's conduct warrants dismissal under a statutory standard of "immorality" is whether his conduct is actually "hostile to the welfare of the school community," [72] and "[t]he private speech or writings of a teacher, not in any way inimical to that welfare, are absolutely immaterial in the application of such standard." [73] Such private acts by a teacher "are his own business and may not be the basis of discipline." [74] The fact that the teacher's reputation had been impaired by the publication of his letter in the local newspaper did not alter the court's ruling. This publication was the result of actions taken by people other than the teacher involved, and he could not be disciplined for the consequent publicity.

In the same vein is the case of a teacher in California whose teaching certificate was revoked because of his participation in a homosexual relationship with another teacher. This action was rescinded by the California Supreme Court.[75] The court stated that the purpose of a statutory provision authorizing the revocation of a teaching certificate "for cause" is not to punish the teacher but to protect the public.[76] The evaluation of a teacher's conduct for employment purposes must be on the basis of evidence directly related to his fitness to perform his teaching obligation effectively, and the particular mores or viewpoints of the school authorities or the community are relevant only to the extent that they touch upon that question. The court phrased the applicable rule as follows:

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[71] *Jarvella v. Willoughly-Eastlake City School Dist.*, 12 Ohio Misc. 288, 233 N.E. 2d 143 (Ohio Ct. Comm. Pleas 1967).

[72] 233 N.E. 2d at 145.

[73] *Ibid.*

[74] *Id.* at 146.

[75] *Morrison v. State Board of Education*, 1 Cal. 3d 214, 461 P. 2d 375 (1969). See also *Norton v. Macy*, 417 F. 2d 1161 (D.C. Cir. 1969).

[76] *Morrison v. State Board of Education, supra*, at 229.

> [A]n individual can be removed from the teaching profession only upon a showing that his retention in the profession poses a significant danger of harm to either students, school employees, or others who might be affected by his actions as a teacher.[77]

*5. Political Activity*

Although statutes prohibiting public employees from participating in political campaigns traditionally have received judicial sanction,[78] several courts recently have taken a contrary view. During the past few years, statutory provisions that have proscribed all forms of political activity (e.g., "no [public] employee shall take an active part in politics or political contests or engage in controversy concerning candidates or issues";[79] no public employee may run for any public office [80]) have been struck down.

In *Montgomery v. White* the school board refused to rehire the plaintiff at least partly because of his participation in political activities.[81] The board's position was predicated upon a regulation that prohibited *all* political activity by teachers. In ruling for the plaintiff, the court declared that "the complete ban on the right of teachers to express political opinions and engage in political activity is inconsistent with the First Amendment guarantee of freedom of speech, press, assembly and petition." [82]

The court expressed concern not solely about the "individuals muzzled" but about other negative consequences as well. Thus, the court noted that the prohibition has a "harmful effect on the community in

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[77] *Id.* at 235. The rationale in earlier cases which imposed the moral standards of the community as a condition of employment in the teaching profession has been seriously undermined if not completely rejected by these recent decisions. See 97 A.L.R. 2d 820, 96 A.L.R. 2d 536.

See also *Parolisi v. Board of Examiners*, 55 Misc. 2d 546, 285 N.Y.S. 2d 1936 (Sup. Ct. Kings Co. 1967), in which the state's decision to deny a teacher a license because of obesity was reversed; *Tringham v. State Board of Educ.*, 50 Cal. 2d 507, 326 P. 2d 850 (1968), in which a teacher whose credentials had been revoked for alleged homosexual activities was ordered reinstated; *Schware v. Board of Bar Examiners*, 353 U. S. 232 (1957), in which the United States Supreme Court overruled the state's decision to deny a graduate lawyer permission to qualify for the practice of law within the state because of the absence of any real evidence to support the state's finding of improper conduct.

[78] See, e.g., *United Public Workers v. Mitchell*, 330 U. S. 75 (1947), upholding the constitutionality of the Hatch Act.

[79] *DeStefano v. Wilson*, 96 N.J. Super., 592, 233 A. 2d 682 (1967).

[80] *Minelly v. Oregon*, 242 Or. 490, 411 P. 2d 69 (1966). See also *Bagley v. Washington Township Hosp. Dist.*, 55 Cal. Rptr. 401, 421 P. 2d 409 (1966); *Huerta v. Flood*, 103 Ariz. 608, 447 P. 2d 866 (1968). Compare *State Employees v. Wisconsin Board*, 298 F. Supp. 339 (W.D. Wis. 1969), in which the court stated that the relinquishment of the right to run for partisan political office can constitutionally be made a condition of public employment.

[81] Civ. Action No. 4933, Slip Op. (U.S.D.C., E.D. Tex. Oct. 24, 1969).

[82] *Id.* at 3.

depriving it of the political participation and interest" of "some of the most influential citizens," particularly in smaller communities.[83] Moreover, the court recognized the "chilling effect" of this type of restriction upon other teachers:

> As to the individual concerned it acts to cut him off from work and income. But to others the consequences might well be more serious. It would be a warning that others would suffer the same fate, so that eventually all that would remain would be workers not feeling free to speak; they would be silent workers.[84]

The court made it clear that not all political activity is necessarily permissible. The school board "may have a legitimate interest in protecting its educational and administrative activities from undue political activity . . . , that is, activity which may materially and substantially interfere with the requirements of appropriate discipline in the operation of the school." [85] The problem, as the court saw it, was "to arrive at a balance between the interests of the teacher, as a citizen, in participating in matters of a political nature and the interest of the state as an employer, in promoting the efficiency of the public services it performs through its employees." [86] In applying this test to the facts before it, the court concluded that the board had attempted to achieve its objectives in a manner that *unnecessarily* impinged upon free expression:

> [S]imply because teachers are on the public payroll does not make them second-class citizens in regard to their constitutional rights. Even though the governmental purposes are legitimate and substantial, such purposes cannot be pursued by means that broadly stifle fundamental personal liberties when the ends sought can be more narrowly achieved. Laws and official regulations which restrict the liberties guaranteed by the First Amendment should be narrowly drawn to meet the specific evil aimed at.[87]

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[83] *Id.* at 2-3.

[84] *Id.* at 3.

[85] *Id.* at 1-2. For example, a limitation on the use of official influence by teachers or administrators in the pursuit of political objectives during working hours presumably would be permissible, as would a regulation prohibiting teachers from holding a position that would demonstrably result in a conflict of interest.

[86] *Id.* at 2.

[87] *Ibid.* See also *Fort v. Civil Service Comm'n. of Co. of Alameda,* 61 Cal. 2d 331, 392 P. 2d 385 (1964), in which a California statute prohibiting any civil service employee from holding or running for any public office or from participating in any partisan or nonpartisan campaign was denied enforcement on the ground that it violated the plantiff's First Amendment right to participate in political activities.

A question that arises with some frequency is whether a school board may restrict the right of a teacher to campaign, either personally or on behalf of another, against a member of his employing school board. The answer would turn upon whether such a campaign would appreciably damage the efficiency and integrity of the public service provided, and this would depend essentially upon the facts in the particular case. It is doubtful, however, whether members of a school board maintain a sufficiently intimate working relationship with individual teachers that such activity would produce the type of disruption in the public service that would warrant its prohibition.[88] The functions of a school board member are such that he normally cannot be characterized as a teacher's immediate superior. Indeed, a school board member rarely, if ever, has any direct contact with an individual teacher. Therefore, a teacher's participation in a school board campaign away from the school premises during off-duty hours usually would not have the kind of injurious impact upon the school system that would justify a school board's interference. Since the composition of the school board is a factor of vital concern to all members of the community, criticism of a school board member and his resulting loss of reputation would clearly seem allowable under the rule set forth in the *Pickering* case.[89]

*6. Civil Rights Activity*

A related line of cases supports the right of a teacher to participate in civil rights activities.

In *Johnson v. Branch* the plaintiff had been active in demonstrations and other activities aimed at racial discrimination.[90] Her contract was not renewed for assigned reasons which were so trivial that the court regarded the school board's action as (a) arbitrary and capricious and (b) based in fact on the plaintiff's civil rights activities. The court held that the board had acted illegally and stated that although "[n]o one questions the fact that the plaintiff had . . . [no] constitutional right to have her contract renewed . . . ,[91] the state may not force the plaintiff

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[88] See *Bagley v. Washington Township Hosp. Dist., supra,* where a nurse who was campaigning during off-duty hours to recall members of the hospital board successfully challenged the state statute proscribing such political activity.

[89] Compare *Watts v. Seward School Board,* 454 P. 2d 732 (Alaska, 1969), cert. denied, 38 U. S. L. Week 3315 (Feb. 24, 1970), upholding a school board's limitation of a teacher's right to campaign on school premises to gain support for the dismissal of the school superintendent.

[90] 364 F. 2d 177 (4th Cir. 1966), cert. denied, 385 U. S. 103 (1967).

[91] *Id.* at 179.

to choose between exercising her legitimate constitutional rights and her right to equality of opportunity to hold public employment." [92]

To the same effect is *Rackley v. School District No. 5, Orangeburg Co., S.C.*, in which the employment of a nontenure teacher was terminated for participating in civil rights demonstrations.[93] In holding that the school board had abused its discretion, the court commented as follows:

> So that no public school teacher may be deprived of those personal liberties secured by the . . . Constitution the discretion exercised by the school boards must be within reasonable limits, so as not to curtail, impinge or infringe upon the freedom of political expression or association, or any other constitutionally protected rights.
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> . . . . . .
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> [T]he Board's action was based upon the exercise by plaintiff of her constitutionally protected rights and privileges. Her discharge by the Board and its failure to rehire her were based upon improper, illegal and constitutionally proscribed considerations, which resulted in an unwarranted and discriminatory exercise of its discretionary powers.[94]

### *7. Organizational Membership*

Governmental restraints on the right of teachers to join organizations traditionally have sought to achieve either of two objectives. One is a desire to keep the teaching ranks free of individuals who embrace "unacceptable" political philosophies. The other is a desire to prevent or retard the development of unionism and collective negotiations.

*Keyishian v. Board of Regents* is the leading case in support of the right of a teacher to become a member of any organization, regardless of its political philosophy or objectives.[95] In that case, faculty members of the State University of New York challenged the constitutionality of New York's Feinberg Law, which disqualified from employment in the public educational system any person who advocated the overthrow of government by force or violence, published material advocating such overthrow *or belonged to any organization advocating such a doctrine*. The Supreme Court invalidated that part of the law which proscribed mere knowing membership in an organization found to be subversive "without any showing of specific intent to further [its] unlawful

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[92] *Id.* at 180.

[93] 258 F. Supp. 676 (D. So. Car. 1966).

[94] *Id.* at 684-85. See also *Williams v. Sumter School Dist. No. 2*, 255 F. Supp. 397 (D. So. Car. 1966).

[95] 385 U. S. 589 (1967).

aims." [96] The court noted that merely joining an organization without contributing to its unlawful activities does not constitute the kind of threat to the public service that would justify a state's interference with an individual's associational rights.[97]

Although there are some early court holdings to the effect that a school board may prohibit teachers from belonging to an employee organization,[98] and some states even have enacted legislation to this effect,[99] such restraints on the right of public employees to organize seem clearly unconstitutional. As the court put it in *Indianapolis Education Association v. Lewallen:*

> There is no question that the right of teachers to associate for the purpose of collective bargaining is a right protected by the First and Fourteenth Amendments to the Constitution.[100]

In *McLaughlin v. Tilendis* [101] two nontenure teachers sued the superintendent of their school district and the members of the board of education for $100,000 damages under the Civil Rights Act of 1871.[102] One had been dismissed, and the other had not had his contract renewed. They claimed that the actions had been taken because of their union activities. The federal district court granted a motion to dismiss, holding that the plaintiffs had no First Amendment right to form or join a union and that, accordingly, they had no cause of action under the Civil Rights Act. The appellate court reversed, stating that "the First Amendment confers the right to form and join a labor union." [103] The court said that "unless there is some illegal intent, an individual's right to form and join a union is protected by the First Amendment." [104] Moreover, "[e]ven though the plaintiffs did not yet have tenure, the Civil Rights Act of 1871 gives them a remedy if their contracts were not renewed because of their exercise of constitutional rights." [105]

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[96] *Id.* at 610.

[97] *Id.* at 607. See also *Elfbrandt v. Russell,* 384 U. S. 11 (1966).

[98] E.g., *People ex rel Fursman v. City of Chicago,* 278 Ill. 318, 116 N.E. 158 (1917).

[99] A statute in North Carolina prohibited public employees from belonging to a labor organization which was affiliated with any national or international organization having as one of its purposes collective bargaining over wages, salaries, hours of employment, or conditions of work. N.C. Gen. Stat §95-97 (1965). See discussion at footnote 109, *infra.*

[100] No. 17808, Slip Op. at 3 (U. S. Ct. of App., 7th Cir. August 13, 1969).

[101] 398 F. 2d 287 (7th Cir. 1968).

[102] 42 U. S. C. §1983 (1964).

[103] 398 F. 2d at 288.

[104] *Id.* at 289.

[105] *Ibid.*

The court replied to the argument that the union might decide to engage in strikes or seek to establish working conditions antithetical to the public interest or adversely affecting the functioning of government as follows:

> It is possible of course that at some future time plaintiffs may engage in union-related conduct justifying their dismissal. But the Supreme Court has stated that "Those who join an organization but do not share its unlawful purposes and who do not participate in its unlawful activities surely pose no threat, either as citizens or as public employees." *Elfbrandt v. Russell,* 384 U. S. 11, 17, 86 S.Ct. 1238, 1241, 166 L.Ed. 2d 321. Even if this record disclosed that the union was connected with unlawful activity, the bare fact that [sic] membership does not justify charging members with their organization's misdeeds. *Idem.* A contrary rule would bite more deeply into associational freedom than is necessary to achieve legitimate state interests, thereby violating the First Amendment.[106]

A similar question arose in *American Federation of State, County and Municipal Employees, AFL-CIO v. Woodward*[107]: Do public employees, discharged for membership in a labor union, have a cause of action for damages and injunctive relief under the Civil Rights Act of 1871? In reaching an affirmative answer, the court held that the right to union membership is protected by the First and Fourteenth Amendments. The court explicitly stated that "[t]he guarantee of the 'right of assembly' protects more than the right to attend a meeting; it includes 'the right to express one's attitudes or philosophies by membership in a group or other lawful means. . . .' "[108]

Consistent with these holdings, a federal district court struck down the aforementioned North Carolina statute that prohibited public employees from belonging to a labor organization which is affiliated with any national or international organization having as one of its purposes collective bargaining over wages, salaries, hours of employment, or conditions of work.[109] The court held that it constituted on its face an unconstitutional abridgement of freedom of association protected by the First and Fourteenth Amendments.

There is a parallel and consistent line of cases from the state courts. See, for example, *City of Springfield v. Clouse,* where the court stated:

> All citizens have the right, preserved by the First Amendment to the United States Constitution . . . to peaceably assemble

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[106] *Ibid.*

[107] 406 F. 2d 137 (8th Cir. 1969).

[108] *Id.* at 139, quoting from *Griswold v. Connecticut,* 381 U. S. 479, 483 (1965). See also *Pred v. Board of Public Instruction,* 415 F. 2d 851 (5th Cir. 1969).

[109] *Atkins v. City of Charlotte,* 296 F. Supp. 1068 (W.D. N. Car. 1969). See footnote 99, *supra.*

> and organize for any proper purpose, to speak freely and to present their views and desires to any public officer or legislative body. . . .
>
> Therefore, we start with the proposition that there is nothing improper in the organization of municipal employees into labor unions; and that no new constitutional provisions were necessary to authorize them.[110]

Nor is it permissible for government to preclude a specific category of educators from membership in an employee organization. This problem has arisen largely as a result of the advent of collective negotiations —more specifically, the role of the "supervisor" in the process. Although the dispute generally has centered upon the structure of the negotiating unit, government agencies have on occasion gone further and have sought to prevent supervisors from belonging to organizations of rank-and-file teachers.

In 1969 Florida enacted a statute which prohibited "all persons employed in the Palm Beach County Public School system whose primary employment is in the capacity of administrator or supervisor . . . from participation or membership in any organization . . . the activities of which includes [sic] the collective representation of members of the teaching profession with regard to terms, tenure or conditions of employment." [111] In striking down this statute, the court stated that, among other things, it "impinges upon basic freedoms of expression and association protected by the First and Fourteenth Amendments." [112]

*8. Loyalty and Other Oaths*

The problems of organizational membership and pure speech dovetail most graphically in connection with the requirement that teachers sign as a condition of employment an oath which prohibits the advocacy of certain positions or membership in any organization which espouses such positions.

In the *Keyishian* case the Supreme Court took the position that the mere advocacy of an abstract doctrine or passive membership in an organization designated by the state as subversive cannot constitu-

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[110] 356 Mo. 1239, 1246-47, 206 S.W. 2d 539, 542 (1947). See also *Norwalk Teachers' Ass'n v. Board of Educ.*, 138 Conn. 269, 83 A. 2d 482 (1951); *State Bd. of Regents v. United Packinghouse Workers Local 1258*, 68 LRRM 2677 (Iowa Dist. Ct. 1968), mod. and aff'd, 175 N.W. 2d 110 (Iowa Sup. Ct. 1970).

To date, however, the courts have not held that there is a constitutional right to require a public employer to negotiate collectively with an exclusive representative or to execute a collective negotiation agreement. See *Indianapolis Education Ass'n. v. Lewallen, supra; Atkins v. City of Charlotte, supra.*

[111] Fla. Laws 1969, Ch. 69-1424.

[112] *Orr v. Thorp*, 308 F. Supp. 1369 (S.D. Fla. 1969).

tionally be prohibited.[113] Thus, the court held that any loyalty oath which precludes membership without proof of a "specific intent to further the illegal aims of the organization" cannot be imposed as a condition of employment. Such an oath is premised on the doctrine of "guilt by association," which as a matter of law cannot be tolerated in a democratic society.[114]

Similarly, in *Shelton v. Tucker* the Supreme Court held that requiring a teacher to reveal every association to which he "belonged or regularly contributed" during the last five years was invalid because of the inhibiting effect of such mandatory disclosure on constitutionally protected freedoms of speech and association.[115]

In *Stewart v. Washington,* the federal district court for the District of Columbia sustained a teacher's challenge to the loyalty oath for employees of the District of Columbia.[116] The oath required an applicant to swear that he did not advocate the overthrow of the government (without specifying violent overthrow) and that he was not a member of an organization that he knew advocated such overthrow, thus precluding from public employment passive members and members who did not support and might even oppose the organization's doctrines.[117]

Equally unlawful are loyalty oaths requiring a teacher to swear or affirm that he has never lent his "aid, advice, counsel, or influence to the Communist party";[118] that he is not now and has not within the recent past been a member of or indirectly affiliated with a Communist front or subversive organization;[119] or that he is not engaged "in one way or another" in an attempt to overthrow the government by force.[120]

In addition to the foregoing oaths, which generally have application to all categories of public employees, attempts have been made to impose certain specific restrictions upon teachers. For example, a Georgia

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[113] 385 U. S. 589 (1967).

[114] *Id.* at 607.

[115] 364 U. S. 479 (1960).

[116] 301 F. Supp. 610 (D.D.C. 1969).

[117] See also *Rudder v. United States,* 226 F. 2d 51, 53 (D.C.Cir. 1955), which held that it is constitutionally impermissible for the managers of a public low-cost housing project to require tenants, as a condition of continued tenancy, to certify nonmembership in any organization listed by the Attorney General of the United States as either subversive or otherwise within the scope of Executive Order No. 9835.

[118] *Cramp v. Board of Public Instruction of Orange Co., Fla.,* 368 U. S. 278 (1961).

[119] *Wieman v. Updegraff,* 344 U. S. 183 (1952).

[120] *Whitehill v. Elkins,* 389 U. S. 54 (1967). See also *Baggett v. Bullitt,* 377 U. S. 360 (1964).

statute required all teachers to affirm that they would "refrain from directly or indirectly subscribing to or teaching any theory of government or economics or of social relations which is inconsistent with the fundamental principles of patriotism and high ideals of Americanism." [121] In holding this provision invalid, the court characterized it as unconstitutionally "vague and uncertain" and "a prohibited inhibition of the First Amendment right to freedom of speech." [122]

The teaching of these and similar holdings is that an oath which precludes advocacy of subversive or unpopular movements or mere membership in organizations which advocate such movements cannot be made a condition of public employment. Only provable actions that establish a specific intent to precipitate the government's violent overthrow or other such result will be sufficient to disqualify a person for a teaching position.[123]

Although several states presently condition public employment upon the execution of an oath which includes an affirmation by the applicant that he does not assert the right to strike against the government and does not belong to any organization which he knows asserts such a right, it is doubtful whether this requirement could withstand a constitutional challenge. Thus, the federal district court for the District of Columbia declared unenforceable such an employment oath for federal employees.[124] While conceding for purposes of the litigation that the government may constitutionally prohibit the act of striking itself,[125] the court declared that a public employee has a constitutionally protected right to argue for the right to strike and to petition Congress to rescind the existing laws prohibiting strikes (i.e., to assert the right to strike).

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[121] *Georgia Conf. of AAUP v. Board of Regents of Univ. of Georgia*, 246 F. Supp. 553, 554 (N.D. Ga. 1965).

[122] *Id.* at 555.

[123] A less rigorous test might apply in the case of applicants for governmental security work. Moreover, any public employee, including a teacher, presumably could be required to execute an employment oath in which he is asked to affirm support for certain basic governmental principles and to subscribe to a standard of competence and dedication. See, e.g., *Knight v. Board of Regents of Univ. of State of New York*, 269 F. Supp. 339 (S.D. N.Y. 1967), aff'd, 390 U. S. 36 (1968); *Ohlson v. Phillips*, 304 F. Supp. 1152 (D. Colo. 1969), aff'd, 38 U. S. L. Week 3366 (March 24, 1970) ("I solemnly [swear] . . . that I will uphold the constitution of the United States and of the State of Colorado, and I will faithfully perform the duties of the position upon which I am about to enter.").

[124] *National Ass'n. of Letter Carriers v. Blount*, 305 F. Supp. 546 (D.D.C. 1969).

[125] On the constitutionality of an absolute prohibition on the right of all public employees to strike, see *City of New York v. Delury*, 23 N.Y. 2d 175 (1968), appeal dism'd, 394 U. S. 455 (1969); *Rankin v. Shanker*, 23 N.Y. 2d 111 (1968), appeal dism'd, 394 U.S. 455 (1969); *Norwalk Teachers Ass'n v. Board of Educ.*, 138 Conn. 269, 83 A. 2d 482 (1951). Compare *Anderson Federation of Teachers v. School City of Anderson*, 251 N.E. 2d 15 (Ind. Sup. Ct. 1969), dissenting opinion.

Similarly, in *Rogoff v. Anderson* a New York court held unconstitutional that section of New York's public employee collective negotiation statute which requires an organization, in order to be recognized or certified, to file an affirmation that it does not assert the right of public employees to strike.[126] Since the statutory provision prohibits the organization from arguing that public employees should have the right to strike, it was held to constitute an improper restriction on the right of free speech.[127]

## *B. No teacher may be dismissed, reduced in rank or compensation, or otherwise deprived of any professional advantage for arbitrary or discriminatory reasons.*

While the courts have been unwilling to concede that there is a specific legal right to acquire or retain a public position, they have recognized the existence of the right "to practice [a] chosen profession." [128] In *Meyer v. Nebraska,* the Supreme Court declared that the concept of "liberty" in the Fourteenth Amendment "denotes not merely freedom from bodily restraint but also the right of the individual . . . to engage in any of the common occupations of life." [129] Whether the interest involved is characterized as the "freedom to teach," [130] "an expectancy of continued employment," [131] or simply a "privilege," [132] it is "an interest which the law will protect against invasion" [133] by arbitrary or discriminatory governmental action.

### *1. Arbitrary Action*

In *Wieman v. Updegraff* the Supreme Court set forth the applicable rule of law as follows:

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[126] 59 L.C. par. 51, 987 (N.Y. Sup. Ct. 1968).

[127] Notwithstanding this holding (which was never reversed or overruled), the condemned provision of the New York statute continues to be applied.

[128] *Greene v. McElroy,* 360 U. S. 474, 492 (1959).

[129] 262 U. S. 390, 399 (1923).

[130] *Ibid.* See also *Griswold v. Connecticut,* 381 U. S. 479, 482 (1965); *Developments in the Law—Academic Freedom,* 81 HARV. L. REV. 1045, 1080-81, and n. 24 (1968).

[131] *Bomar v. Keyes,* 162 F. 2d 136, 139 (2d Cir. 1947).

[132] *Homer v. Richmond,* 292 F. 2d 719, 722 (D.C. Cir. 1961);Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law,* 81 HARV. L. REV. 1439 (1968).

[133] *Bomar v. Keyes, supra,* at 139.

> We need not pause to consider whether an abstract right to public employment exists. It is sufficient to say that constitutional protection does extend to the public servant whose exclusion . . . is patently arbitrary. . . .[134]

Two recent decisions by a federal district court in Wisconsin are illustrative of this principle. Both cases arose as the result of decisions not to renew the contracts of certain nontenure teachers—in one case, elementary and secondary school teachers,[135] and in the other, a professor at a public college.[136] The plaintiffs argued, among other things, that their employment was terminated for arbitrary reasons and that their rights under the due process clause of the Fourteenth Amendment had therefore been violated.

The principal defense in both cases was that the plaintiffs had no right to renewal of their teaching contracts under the substantive law of Wisconsin. It was argued that they were employed for one school year under contracts which were neither terminated nor breached, but expired by their own terms; the procedure followed in advising the plaintiffs of the decision not to reemploy them was in accord with the requirements of state law, which demands only that a nontenure teacher be notified of the board's unwillingness to renew his contract; Wisconsin case law permits the board to refuse to renew a nontenure teacher's contract "for any cause or no cause at all," except that the decision of nonrenewal cannot be based upon constitutionally impermissible grounds; and plaintiffs did not allege or show that the defendants refused to renew their contracts for any constitutionally impermissible reason.

In rejecting this line of argument, the court minced no words in holding that nontenure teachers are entitled to the substantive protections of the Fourteenth Amendment in connection with the proposed termination of their employment. In the *Gouge* case it stated:

> [A] teacher in a public elementary or secondary school is protected by the due process clause of the Fourteenth Amendment against a nonrenewal decision which is wholly without basis in fact and also against a decision which is wholly unreasoned, as well as a decision which is impermissibly based (such as race, religion or exercise of First Amendment freedom of expression).[137]

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[134] 344 U. S. 183, 192 (1957).

[135] *Gouge v. Joint School District No. 1*, No. 69-C-166, Slip Op. (U.S.D.C., W.D. Wisc. March 16, 1970); consolidated with *Klein v. Joint School District No. 1*, No. 69-C-165.

[136] *Roth v. The Board of Regents of State Colleges*, No. 69-C-24, Slip Op. (U.S.D.C., W.D. Wisc. March 16, 1970).

[137] Slip Op. at 11-12.

This point was developed in somewhat greater detail in the *Roth* case. As the court saw it, the problem was to balance " 'the precise nature of the government function involved [against] the private interest that has been affected by governmental action.' " [138] Applying this test to the facts before it, the court reasoned as follows:

> I am called upon to consider the interest of the university in assembling and preserving a community of teachers and scholars. I am to consider how vital it is to this interest that during a relatively short initial interval, the university be free arbitrarily to decide not to retain a professor, so long as its decision is not based upon his exercise of freedoms secured to him by the Constitution. . . . If the university is forbidden, constitutionally, to rest its decision on such an arbitrary basis, the question arises: in practice will the university become so inhibited that the available spectrums of reasons for non-retention in the two situations will merge, the distinction between tenure and absence of tenure will shrink and disappear, and the university will be unable to rid itself of newcomers whose inadequacies are promptly sensed and grave but not easily defined? It will not do to ignore this danger to the institution and to its central mission of teaching and research.
>
> As against this danger, however, there is to be set the interest of the individual new professor. To expose him to non-retention because the deciding authority is utterly mistaken about a specific point of fact, such as whether a particular event occurred, is unjust. To expose him to non-retention on a basis wholly without reason, whether subtle or otherwise, is unjust. There can be no question that, in terms of money and standing and opportunity to contribute to the educational process, the consequences to him probably will be serious and prolonged and possibly will be severe and permanent. "Badge of infamy" is too strong a term, but it is realistic to conclude that non-retention by one university or college creates concrete and practical difficulties for a professor in his subsequent academic career.
>
> *The balancing test . . . compels the conclusion that under the due process clause of the Fourteenth Amendment the decision not to retain a professor employed by a state university may not rest on a basis wholly unsupported in fact, or on a basis wholly without reason.*[139] (emphasis added)

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[138] Slip Op. at 8.

[139] *Id.* at 10-11. See also *Williams v. Sumter School Dist. No. 2*, 255 F. Supp. 397, 403 (D. So. Car. 1966); *Schware v. Board of Bar Examiners*, 353 U.S. 232, 238 (1957); *Wieman v. Updegraff*, 344 U.S. 183, 192 (1957); *Olson v. Regents of the Univ. of Minn.*, 301 F. Supp. 1356, 1359 (D. Minn. 1969); compare *Lucia v. Duggan*, 303 F. Supp. 112 (D. Mass. 1969).

Berger, *Administrative Arbitrariness and Judicial Review*, 65 COLUM. L. REV. 55, 57 (1969) ("Let administrators who seek shelter for arbitrariness be required to justify themselves. Arbitrariness is too serious to be sheltered on an *assumption* that a particular category requires insulation.") (footnotes omitted) (emphasis in original); H. Jones, *The Rule of Law and the Welfare State*, 58

The foregoing is not meant to imply that a school board may not exercise discretion in deciding whether to hire, discipline, or dismiss a teacher. The point is that "[d]iscretion means the exercise of judgment, not bias or capriciousness. Thus, it must be based on fact and supported by reasoned analysis." [140]

School boards may also be subject to reversal where they discipline an employee for violation of an unannounced policy. The previously discussed *Keefe* case, in which a teacher was dismissed for assigning to his class an article containing "a vulgar term for an incestuous son," is illustrative.[141] In the court's view, the fact that the teacher was not told in advance that this was forbidden conduct which would subject him to disciplinary action was, in and of itself, sufficient to entitle him to reinstatement.

The court does not go so far as to suggest that a school board may never take disciplinary action against a teacher unless he has been expressly alerted to the possible negative consequences of the action in question. On the contrary, it recognizes that certain actions may so exceed acceptable standards of behavior that a teacher may "be on notice of impropriety from the circumstances of a case without the necessity of a regulation." [142] In effect, then, the court seems to indi-

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COLUM. L. REV. 143, 156 (1958) ("It is the task of the rule of law to see that . . . encounters [with managers of state enterprises] are as fair, as just, and as free from arbitrariness as are the familiar encounters of the right-asserting private citizen with the judicial officers of the traditional law."); note, *Developments in The Law—Academic Freedom*, 81 HARV. L. REV. 1045, 1092 (1968) ("Despite the advantages of probation, there is little reason to give the board unbridled discretion. . . . The interest of a probationary teacher and the community in academic freedom requires that some safeguards against arbitrary Board action be provided.").

[140] *Johnson v. Branch*, 364 F. 2d 177, 181 (4th Cir. 1966).

The general proposition that teachers may not be subjected to arbitrary school board action is buttressed by several recent holdings in the non-teacher field.

In *Vinson v. Greenburgh Housing Authority* (288 N.Y.S. 2d 159 (2d Dept. 1968)), a New York court held that tenants in government housing projects cannot be deprived of their right to continue occupancy through the exercise of contractual provisions which permit termination of the lease and summary eviction. The action of the housing authority must not rest on mere whim or caprice or an arbitrary reason. Due process of law "extends to every case which may deprive a citizen of life, liberty, or property, whether the proceeding be judicial, administrative or executive in nature. . . . Once the state embarks into the area of housing as a function of government, necessarily that function, like other governmental functions is subject to the constitutional commands. . . . The Government as landlord is still the Government. It must not act arbitrarily, for, unlike private landlords, it is subject to the requirements of due process of law. . . ." (*Id.* at 163.) Similarly, in *Howard v. Smyth* (365 F. 2d 428 (4th Cir. 1966)), it was held that a prisoner may not be confined to a maximum security ward for arbitrary reasons, i.e., because of his request that arrangements be made for "Black Muslim" religious services and his refusal to reveal the names of other interested prisoners.

But see *Jones v. Hopper*, 410 F. 2d 1323 (10th Cir. 1969), cert. denied, 38 U. S. L. Week 3370 (March 24, 1970), in which a complaint alleging that a denial of reappointment violated rights of free speech and religion of a professor at a state college was dismissed on the ground that, absent any statutory or contractual restriction, a state college has the absolute right to dismiss its nontenure employees with or without cause.

[141] *Keefe v. Geanakos*, 418 F. 2d 359 (1st Cir. 1969).

[142] *Id.* at 362.

cate that a school board may discipline a teacher pursuant to an unannounced policy only when the teacher's conduct is so gross as to render an express prohibition superfluous.[143]

Merely because a school board establishes a standard it does not mean that the constitutional requirements have been met. The standard itself may be challengeable unless it is sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties. As the Supreme Court put it in *Speiser v. Randall,* "when one must guess what conduct or utterance may lose him his position, one necessarily will 'steer far wider of the unlawful zone. . . .' " [144] Thus, the admonition that "[t]he danger of [the] . . . chilling effect upon the exercise of vital First Amendment rights must be guarded against by sensitive tools which clearly inform teachers what is being proscribed." [145]

A recent case in point is *Soglin v. Kauffman.*[146] In that case students at the University of Wisconsin brought suit to enjoin suspension and/or dismissal proceedings based upon University rules which they alleged were vague and overbroad. The relevant rule permitted disciplining of students for "misconduct." The federal district court held that the standard of "misconduct" was "unconstitutionally vague" and "overly broad" and that threatened disciplinary proceedings against the students based upon it should be enjoined.[147]

### 2. *Discriminatory Action*

It has long been recognized that teachers may not constitutionally be discriminated against on the basis of race, religion, or national origin. Judicial elaboration of this prohibition has come largely in connection with the desegregation of southern school systems pursuant to the Supreme Court's decision in *Brown v. Board of Education of Topeka.*[148]

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[143] Although this aspect of the opinion is somewhat cryptic, the court appears to place such actions at one end of a continuum. At the other extreme, there are certain prohibitions which are so inherently arbitrary that even their prior articulation would not obviate the constitutional impediment to their enforcement. Between these two extremes are actions which arguably may be subjected to some restraint, provided there are appropriate legal safeguards. The court holds that the prohibition imposed by the school board in the *Keefe* case was of the inherently arbitrary type, but indicates that even if it were in the middle area the result would be the same because of the absence of advance notice.

See also *Lucia v. Duggan,* 303 F. Supp. 112 (D. Mass. 1969).

[144] 357 U. S. 513, 526 (1958).

[145] *Keyishian v. Board of Regents,* 385 U. S. 589, 604 (1967).

[146] 295 F. Supp. 978 (W.D. Wisc. 1968), aff'd 418 F. 2d 163 (7th Cir. 1969).

[147] *Id.* at 984-85. See also *Albaum v. Carey,* 283 F. Supp. 3 (E.D. N.Y. 1968); *Hornsby v. Allen,* 326 F. 2d 605, 610, rehearing denied, 330 F. 2d 55 (5th Cir. 1964).

[148] 347 U. S. 483 (1954).

Although the *Brown* decision itself failed to touch directly upon the problem of faculty segregation, its implementation has raised critical questions regarding the job security of numerous black teachers.[149] The matter received some superficial attention in a number of early court-ordered desegregation plans, but only in the last few years have the courts focused on the discriminatory treatment of teachers as part of the larger problem of segregated schools. In 1965, the Supreme Court explicitly held that faculty allocation on a nonracial basis must be an integral part of any desegregation plan.[150]

The courts have endeavored to lay down rather detailed guidelines for implementing this aspect of the Supreme Court's desegregation mandate. The nature of these guidelines is reflected in the following excerpts from a recent opinion of the United States Court of Appeals for the Fifth Circuit, which includes within its jurisdiction many of the states most directly affected by *Brown* and its progeny:

> Staff members who work directly with children, and professional staff who work on the administrative level will be hired, assigned, promoted, paid, demoted, dismissed, and otherwise treated without regard to race, color, or national origin.
>
> If there is to be a reduction in the number of principals, teachers, teacher-aides, or other professional staff employed by the school district which will result in a dismissal or demotion of any such staff members, the staff member to be dismissed or demoted must be selected on the basis of objective and reasonable non-discriminatory standards from among all the staff of the school district. In addition if there is any such dismissal or demotion, no staff vacancy may be filled through recruitment of a person of a race, color or national origin different from that of the individual dismissed or demoted, until each displaced staff member who is qualified has had an opportunity to fill the vacancy and has failed to accept an offer to do so.

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[149] Typically, the reorganization of a dual school system into a unitary system has been accomplished by transferring black students into previously all-white schools accompanied by the partial or complete closing of previously all-black schools. This often resulted in the reduction or elimination of teaching positions at the previously all-black schools without a corresponding increase in the number of positions at the previously all-white schools, because classes there were commonly underenrolled before. The overall effect was a reduction in the total number of teaching positions in the school system. In putting such desegregation plans into effect, school boards often attempted to operate from the premise that since the reduction in teaching positions occurred at previously all-black schools, the teachers at those schools (who, of course, were black) would be the ones to lose their jobs. Moreover, they not infrequently failed to give those teachers whose employment was terminated any preference in filling vacancies which did exist at the previously all-white schools. In practice, then, vacancies often were filled by new white applicants ahead of the black teachers previously employed in the school system.

[150] *Bradley v. School Board of the City of Richmond*, 382 U. S. 103 (1965).

In *Rogers v. Paul*, 382 U. S. 198, 200 (1965), the court recognized the standing of students to challenge the racial allocation of faculty on the ground that such allocation "denies them equality of educational opportunity without regard to segregation of pupils" and "renders inadequate an otherwise constitutional pupil desegregation plan. . . ."

> Prior to such a reduction, the school board will develop or require the development of non-racial objective criteria to be used in selecting the staff member who is to be dismissed or demoted. These criteria shall be retained by the school district. The school district also shall record and preserve the evaluation of staff members under the criteria. Such evaluation shall be made available upon request to the dismissed or demoted employee.[151]

A federal district court has gone somewhat further in an effort to assure the necessary objectivity. After reiterating the above rules, the court ordered that the following specific data be submitted to it:

> In the event that the system, in connection with its conversion to a unitary system, plans to dismiss or demote personnel, as those terms are hereinabove used, a report containing the following information shall be filed with the Court and served upon the parties by June 1, 1970:
> (1) The system's nonracial objective criteria used in selecting the staff member(s) dismissed or demoted;
> (2) The name, address, race, type of certificate held, degree or degrees held, total teaching experience and experience in the system and position during the 1969-70 school year of each person to be dismissed, or demoted as hereinabove defined; and in the case of demotion, the person's new position during the 1970-71 school year and his salaries for 1969-70 and 1970-71;
> (3) The basis for the dismissal or demotion of each person, including the procedure employed in applying the system's nonracial objective criteria;
> (4) Whether or not the person to be dismissed or demoted was offered any other staff vacancy; and, if so, the outcome; and, if not, the reason.[152]

It has been a not uncommon practice for school boards to favor male over female teachers in regard to salaries and other aspects of employment. Although this specific type of discrimination has not itself been judicially condemned, the fate accorded to analogous practices indicates that it will not survive a constitutional challenge.

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[151] *En Banc School Cases*, No. 28349, Slip Op. at 12-14 (U. S. Ct. of App. 5th Cir. Dec. 1969).

The term "demotion" was defined by the court as follows: " 'Demotion' as used above includes any reassignment (1) under which the staff member receives less pay or has less responsibility than under the assignment he held previously, (2) which requires a lesser degree of skill than did the assignment he held previously, or (3) under which the staff member is asked to teach a subject or grade other than one for which he is certified or for which he has had substantial experience within a reasonably current period. In general and depending upon the subject matter involved, five years is such a reasonable period." *Id.* at 14.

[152] *Lee v. Macon County Board of Education*, Civ. Action No. 604-E, Slip Op. (U.S.D.C., M.D. Ala. E.D. Feb. 12, 1970).

For a more complete examination of some of the legal problems arising from the desegregation of southern school systems, see Emerson, Thomas I.; Haber, David; and Dorsen, Norman. *Political and Civil Rights in the United States*. Boston: Little, Brown, & Co., 1967. Vol II, pp. 1607-1792.

In *Kirstein v. The Rectors and Visitors of the University of Virginia,* four women brought suit to compel their admission to the University of Virginia.[153] In holding invalid the University's all-male admissions policy, the court concluded:

> [T]he Commonwealth of Virginia may not now deny to women, on the basis of sex, educational opportunities at the [University]. . . . [P]laintiffs have been . . . denied their constitutional right to an education equal with that offered men . . . and . . . such discrimination on the basis of sex violates the Equal Protection Clause of the Fourteenth Amendment.[154]

The significance of the foregoing holding in the teacher employment context should be properly understood. While sex per se may not provide the basis for making distinctions, such distinctions would be permissible when sex constitutes a bona fide occupational qualification.

Even if a proposed restriction is not inherently defective and would otherwise be permissible, it may be constitutionally improper if applied in an inequitable or discriminatory manner. For example, it would be violative of the equal protection clause of the Fourteenth Amendment for a school board to impose restraints upon a teacher that are more onerous than those imposed upon others in the same category. This was the situation in *Trister v. University of Mississippi.*[155]

The case arose when two members of the Mississippi University Law School faculty were directed by the University to discontinue their participation in the North Mississippi Legal Services Program of the Office of Economic Opportunity. This program was designed to provide legal services to the poor in the area in which the University is located. In holding that the University's action violated the plaintiffs' constitutional rights, the court commented as follows:

> We are not willing to take the position that plaintiffs have a constitutional right to participate in the Legal Services Program of the OEO, or in any other program. Nor do they have a constitutional right to engage in part-time employment while teaching part-time at the Law School. No such right exists in isolation. *Plaintiffs, however, do have the constitutional right to be treated by a state agency in no significantly different manner from others who are members of the same class,* i.e., members of the faculty of the University of Mississippi School of Law.[156]
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> . . . . . .

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[153] Civil Action No. 220-69-R, Slip Op. (U.S.D.C., E.D. Va. Feb. 9, 1970).

[154] *Id.* at 4-5

[155] 420 F. 2d 499 (5th Cir. 1969).

[156] *Id.* at 502.

> It appears clear that the only reason for making a decision adverse to [plaintiffs] was that they wished to continue to represent clients who tended to be unpopular. This is a distinction that can not be constitutionally upheld. The University may well decide not to employ any part-time professors, and it may decide to forbid the practice of law to every member of its faculty. *What the University as an agency of the State must not do is arbitrarily discriminate against professors in respect to the category of clients they may represent. Such a distinction is an abuse of discretion which denies to plaintiffs the equal protection of the law guaranteed to them by the Fourteenth Amendment.*[157] (emphasis added)

## *C. No teacher may be dismissed, reduced in rank or compensation, or otherwise deprived of any professional advantage unless he is given notice of the charges against him, a fair hearing, and related procedural safeguards.*

Although the courts have not been of one mind regarding the precise procedures which under the Constitution must be followed before a penalty may be imposed upon a teacher, an increasing number have recognized that the constitutional mandate

> . . . requires that a teacher be notified of the charges against him or her and that he or she be given an opportunity to respond and the knowledge of and right to demand a hearing before final action is taken. . . .[158]

This principle was highlighted by the Supreme Court in *Slochower v. Board of Higher Education of N.Y.C.*, a case involving the summary dismissal of a professor at a public college in New York City.[159] The action had been taken pursuant to a provision of the New York City Charter permitting termination of the employment of any city employee who invoked his privilege against self-incrimination to avoid answering a question relating to his official conduct. In concluding that there had been an unconstitutional lack of fairness in the proceedings that led to the termination of the plaintiff's employment, the court stated:

> There has not been the "protection of the individual against arbitrary action" which Mr. Justice Cardozo characterized as the very essence of due process. [citations omitted]

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[157] *Id.* at 504.

[158] *Teel v. Pitt Co. Bd. of Educ.*, 272 F. Supp. 703, 710 (E.D. No. Car. 1967).

[159] 350 U. S. 551 (1956).

> This is not to say that Slochower has a constitutional right to be an associate professor of German at Brooklyn College. The State has broad powers in the selection and discharge of its employees, and it may be that proper inquiry would show Slochower's continued employment to be inconsistent with a real interest of the State. But there has been no such inquiry here. We hold that the summary dismissal of appellant violates due process of law.[160]

Similarly, an employee of the University of Minnesota who was dismissed because of his alleged physical attacks upon other University employees was reinstated by a federal district court on the ground that the procedures governing his dismissal were constitutionally defective.[161] The court held that although the plaintiff may not have been entitled to a full administrative or judicial hearing prior to the termination of his employment, he was entitled at least to be notified in advance of the charges against him and given an opportunity to respond, either in writing or in person, to them.

Also illustrative of this principle is the previously discussed *Lucia* case, in which a teacher in Massachusetts was summarily dismissed for violating an unannounced school policy prohibiting the wearing of beards.[162] In ordering him reinstated with damages as well as back pay, the court made it clear that a teacher is entitled not only to be notified of the charges against him, but also to be given a fair opportunity to refute them. It then stated:

> The particular circumstances of a dismissal of a public school teacher provide compelling reasons for application of a doctrine of procedural due process. . . . The American public school system, which has a basic responsibility for instilling in its students an appreciation of our democratic system, is a peculiarly appropriate place for the use of fundamentally fair procedures.[163]

*Gouge v. Joint School District No. 1* [164] and *Roth v. The Board of Regents of State Colleges*[165] also warrant mention in the present context.

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[160] *Id.* at 559, citing *Ohio Bell Tel. Co. v. Public Utilities Comm'n*, 301 U. S. 292 (1937).

[161] *Olson v. Regents of the Univ. of Minn.*, 301 F. Supp. 1356, 1359 (D. Minn. 1969).

[162] *Lucia v. Duggan, supra.*

[163] *Id.* at 118-19.

But see *Parker v. Board of Educ. of Prince George's Co., Md.*, 237 F. Supp. 222 (D. Md.), aff'd, 348 F. 2d 464 (4th Cir. 1965), cert. denied, 382 U. S. 1030 (1966), in which it was held that a nontenure teacher whose contract was not renewed because he had assigned the Huxley novel *Brave New World* to one of his classes was not entitled to a hearing; *Freeman v. Gould Special School Dist. of Lincoln Co.*, 405 F. 2d 1159 (8th Cir. 1969), cert. denied, 396 U. S. 843 (1969).

[164] *Supra* footnote 135.

[165] *Supra* footnote 136.

In the *Gouge* case the court commented as follows regarding the procedural due process point:

> [A] teacher in a public elementary or secondary school is entitled to a statement of the reasons for considering nonrenewal, a notice of a hearing at which the teacher can respond to the stated reasons, and the actual holding of such a hearing if the teacher appears at the specified time and place. A necessary corollary to this proposition is that the Board's ultimate decision may not rest on a basis of which the teacher was never notified, nor may it rest on a basis to which the teacher had no fair opportunity to respond.[166]

In *Roth* the court explained the rationale underlying the above position and offered some further specification as to the procedures that are constitutionally necessary:

> Substantive constitutional protection for a university professor against non-retention in violation of his First Amendment rights or arbitrary non-retention is useless without procedural safeguards. I hold that minimal procedural due process includes a statement of the reasons why the university intends not to retain the professor, notice of a hearing at which he may respond to the stated reasons, and a hearing if the professor appears at the appointed time and place. At such a hearing the professor must have a reasonable opportunity to submit evidence relevant to the stated reasons.[167]

An analogous line of cases supports the proposition that teachers cannot be deprived of employment advantages without being accorded procedural due process.

In *Dixon v. Alabama State Board of Education* the plaintiff was a student in a publicly supported university who had been expelled for misconduct without being given an opportunity to be heard and to refute the charges against him.[168] The court identified as the precise interest at the heart of the plaintiff's complaint the right to seek an

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[166] *Gouge v. Joint School District No. 1*, at 13.

[167] *Roth v. The Board of Regents of State Colleges* at 12 (footnote omitted).

In *Roth*, the court places the burden of going forward at the hearing on the teacher. While it also states that it is placing the burden of *proof* on the teacher, subsequent language suggests that the teacher is required only to establish a *prima facie* case at which point the burden presumably would shift to the board. The relevant passage is as follows:

> The burden of going forward and the burden of proof rests with the professor. Only if he makes a reasonable showing that the stated reasons are wholly inappropriate as a basis for decision or that they are wholly without basis in fact would the university administration become obliged to show that the stated reasons are not inappropriate or that they have a basis in fact. *Id.* at 12-13. (footnote omitted)

It might also be noted that *Gouge* and *Roth* are the first cases which squarely extend the right to notice and a hearing to a nontenure teacher whose contract the board proposes *not to renew* as opposed to a teacher who is threatened with dismissal during the term of his contract. See footnote 8, *supra*.

[168] 294 F. 2d 150 (5th Cir.), cert. denied, 368 U. S. 930 (1961).

education at an institution of higher learning. Since this right was jeopardized by expulsion because of the probability that he could not gain entrance to any other college or university, the court held that the plaintiff was entitled to at least the following procedural rights: a statement of the specific charges, including the grounds which, if proved, would justify expulsion; a hearing (something more than an informal interview) providing an opportunity to hear both sides in considerable detail; and the rudiments of an adversary proceeding (i.e., the names of the witnesses against him, an oral or written report of their testimony, and an opportunity to present his defense to a hearing officer and to produce either oral testimony or written affidavits of witnesses in his own behalf).

In *Stricklen v. University of Wisconsin Regents* it was held that students allegedly involved in damaging or destroying university property had been improperly suspended (pending hearing) because of the absence of charges, notice of hearing, or hearing.[169] The court stated that unless there is present the element of danger to persons or property if the student is permitted to remain on campus, suspension cannot be imposed without a full hearing at which the defendant is accorded all of the elements of procedural due process required by the Constitution. Where such danger is present, an interim suspension may be imposed. However, even an interim suspension is not proper without a prior preliminary hearing, unless it can be shown that it is impossible or unreasonably difficult to hold such a hearing before suspension. In the latter situation, procedural due process requires that the student be provided a preliminary hearing at the earliest practical time with an opportunity to persuade the suspending authority that there is a case of mistaken identity, that there was extreme provocation, or that there is some other compelling justification for terminating the suspension.[170]

Two federal courts of appeals have ruled that physicians on the staffs of public hospitals, who had no statutory protection against termination of their employment, could not be dismissed (*Birnbaum v. Trussell*[171]) or refused reappointment (*Meredith v. Allen County War Memorial Hosp. Comm'n*[172]) without proper notice and hearing. Although neither decision defines the specific nature of the required hearing, the court did note in the *Meredith* case that "if a hearing is

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[169] 297 F. Supp. 416 (D. Wisc. 1969).

[170] See also *Wasson v. Trowbridge*, 382 F. 2d 807 (2d Cir. 1967), requiring that a cadet at the Merchant Marine Academy be given a hearing at which he is apprised of the specific charges against him and afforded an adequate opportunity to present his defense—through witnesses and other evidence.

[171] 371 F. 2d 672 (2d Cir. 1966).

[172] 397 F. 2d 33 (6th Cir. 1968).

required, it must of course be a fair one—one in which the employee has notice and an adequate opportunity to respond to the charges against him." [173]

One of the most definitive statements of the procedural prerequisites to the imposition of a governmental penalty is found in the Supreme Court's decision in *Goldberg v. Kelly*.[174] The question for decision was "whether a State which terminates public assistance payments to a particular recipient without affording him the opportunity for an evidentiary hearing prior to termination denies the recipient procedural due process in violation of the Due Process Clause of the Fourteenth Amendment." [175] After answering this question affirmatively, the Court then turned to the nature of the required hearing and set forth what it considered to be "the minimum procedural safeguards . . . demanded by rudimentary due process." [176] Included are: (1) " 'the opportunity to be heard' " . . . " 'at a meaningful time and in a meaningful manner' "; (2) "timely and adequate notice detailing the reasons for a proposed termination"; (3) "an effective opportunity to defend . . . by presenting . . . arguments and evidence orally"; (4) "an opportunity to confront and cross-examine adverse witnesses"; (5) the right "to retain an attorney"; (6) a decision resting "solely on the legal rules and evidence adduced at the hearing"; (7) a statement by the decision maker of "the reasons for his determination and . . . the evidence he relied on"; and (8) "an impartial decision maker." [177]

The supreme courts of several states have confirmed the principle that the dismissal of a teacher without a hearing is a violation of due process of law.

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[173] *Id.* at 36.

See also *McCarley v. Sanders*, 309 F. Supp. 8 (M.D. Ala. 1970), holding that the due process clause of the Fourteenth Amendment barred the Alabama senate from expelling a state senator who was not formally charged or given an opportunity to confront or cross-examine witnesses appearing before the senate investigating committee.

[174] 38 U. S. L. Week 4223 (March 24, 1970).

[175] *Id.* at 4223.

[176] *Id.* at 4226.

[177] *Id.* at 4226-27.

In concluding that "only a pre-termination evidentiary hearing provides the recipient with procedural due process" (*Id.* at 4225), the court notes that

> . . . the crucial factor in this context—a factor not present in the case of the . . . discharged government employee . . .—is that termination of aid pending resolution of a controversy over eligibility may deprive an *eligible* recipient of the very means by which to live while he waits. (*Ibid.*) (emphasis by the court)

This might at first glance seem to raise some question about the applicability of the holding to a teacher case. However, the court mentions the factor only in connection with the relative need for a pre- (as opposed to a post-) termination hearing. Having once resolved that issue, the court is guided by other factors which "justify the limitation of the pre-termination hearing to *minimum* procedural safeguards." (*Id.* at 4226.) (emphasis added)

In *Kuehn v. School Dist. No. 70* the Minnesota court held that the summary dismissal of a nontenure teacher was invalid, notwithstanding the absence of a statutory right to a hearing:

> [S]ince in dismissing a teacher the board acted in a quasi-judicial capacity, plaintiff was entitled to notice and hearing before dismissal and . . . the action of the board in not proceeding in this manner was lacking due process of law as arbitrary and capricious. . . . The denial of a hearing was conclusive that the board's action was arbitrary.[178]

To the same effect is *Johnson v. Board of Educ.*, in which the Arizona court read the right to a prior hearing into a statute permitting the dismissal of nontenure teachers, even though the statute did not expressly provide for a hearing:

> [W]e hold that when a teacher's probationary . . . contract is to be cancelled he is entitled to present his position at a hearing held for this purpose.[179]

The fact that a school board promulgates and complies with its own disciplinary procedures does not reduce its constitutional obligation—the courts will review the procedures to determine whether they comply with due process requirements. From the teacher's point of view, however, the existence of such procedures is significant, since a failure by the board to comply might, in and of itself, constitute a denial of his constitutional rights. Thus, the failure of the federal government to accord an employee charged with subversive activities a full hearing with the right to cross-examine his accusers, in accordance with the government's published regulations, was held to be a denial of due process even though the matter allegedly involved the national security.[180] The dismissal was reversed and the employee reinstated unless and until the government complied with its own regulations.

Similarly, in *Murray v. Blatchford* a federal district court determined that the Peace Corps had failed to follow its own regulations in terminating the plaintiff's employment.[181] The court, therefore, found it unnecessary to deal with the general question of the "minima required by

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[178] 22 N.W. 2d 220, 221 (1946).

[179] 419 P. 2d 52, 57 (1966).

See also *School Dist. No. 1 v. Thompson*, 214 P. 2d 1020 (Col. Sup. Ct. 1950), in which the school board had conducted a hearing prior to the dismissal of a nontenure teacher, even though the statute permitted summary dismissal. The teacher alleged that the hearing provided did not meet the requirements of due process, and the board contended that no hearing was required at all. The Colorado court specifically approved the decision in the *Kuehn* case and held that due process requires a prior hearing. The court concluded, however, that the hearing accorded to the teacher did meet the necessary requirements.

[180] *Vitarelli v. Seaton*, 359 U. S. 535 (1959).

[181] 307 F. Supp. 1038 (D.R.I. 1969).

due process in the context of a termination from Peace Corps service." [182] In concluding that the plaintiff had been denied due process, it predicated its holding on the fact that the "agency has violated its own regulatory framework for termination." [183]

## *III. CONCLUSION*

The nature and purpose of this document should be correctly understood. It is not intended as an advocate's brief and, accordingly, we have made no attempt to suggest new lines of legal exploration or development. Although we have indicated what we consider to be the more significant ramifications of the cases cited, our primary purpose has been to report the law as it has developed to date.

It should by no means be assumed that the holdings discussed represent in any sense the potential outer limits of constitutional protection for teachers. This is not a static area, and later courts undoubtedly will have no hesitancy in discarding doctrines that fail to meet the needs of the times—just as the courts of today have not hesitated to reject the decisions of their predecessors. We may conclude with the observation that the mode is change and the direction is toward increased protection of teacher rights.

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[182] *Id.* at 1052.

[183] *Ibid.* See also *United States v. Walsh*, 279 F. Supp. 115 (1968).